IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION No. 5783 of 1997

Shri Bhagogi Phulaji Magdum ,
presently residing at – post Ekondi,
Taluka : Kagal, District Kolhapur. .. Petitioner.

V/S

1. The Union of India,
through the Central Govt.
Advocate, Department of
Law & Judiciary, I-Kar Bhawan,
Mumbai.

2. Ministry of defence,
Government of India,
through its Secretary, New Delhi.

3. Director General of EME,
(EME PERS), Master General
of Ordinance Branch, Army
Headquarters DHO, P.O.,
New Delhi 110 011.

4. Dy. Secretary, Minister of Defence,
Government of India. ... Respondents

Shri S. S. Pakale for the petitioner.
Mr. T. C. Kaushik for respondent nos. 1 to 4.

CORAM: **SMT. RANJANA DESAI**
&
SHRI A. P. DESHPANDE JJ.

DATE: 25/7/2006

ORAL JUDGMENT (Per **SMT. RANJANA DESAI** J.)

1. The petitioner is an ex- army person. He has challenged in this petition order dated 24.4.1991 passed by the Chief Controller of Defence Accounts (Pension), Allahabad and order dated 2.12.1992 passed by the Secretary, Defence Ministry, New Delhi. By these orders the petitioner's claim for disability pension was rejected.

2. The facts which give rise to the present petition, as are evident from the petition and the affidavits filed by the respondents, may be shortly stated.

3. The petitioner joined his duties as clerk (GD) in respondent no.2 that is the Minstry of Defence, Government of India, New Delhi with effect from 14.3.1986. He reported at Bhopal. On reporting he was asked to undergo the regular training of 6 months. Thereafter the petitioner was posted with the 3rd battalion for 3 months. Thereafter he was

posted at Aurangabad. It is the case of the petitioner that he is a good wrestler and he used to take part in wrestling while in service. He was an official player of respondent no.2. When he was at Aurangabad he got severe pain in his abdomen. He was then admitted in hospital for treatment. He was given treatment as an indoor patient. Thereafter he was at Command Hospital, Pune, where he was asked to undergo various medical tests. Finally the doctor advised surgery. His right kidney was removed. According to the petitioner as a result of surgery he became disabled. He therefore submitted his disability pension papers as per the Pension Regulations for the Army 1961 ('the said Regulations' for short). The petitioner's application was rejected on 24.4.1997. The appeal carried from the said rejection was also dismissed. According to the petitioner his application was wrongly rejected because his disability has nexus with his military service. The petitioner has therefore challenged the orders rejecting his disability pension.

4. In short the case of the respondents is that the petitioner's ailment has no nexus with his military service. The

petitioner was suffering from reno vascular hypertension. According to the respondents the Medical Board of the respondents opined that the petitioner' s disability was not attributable to or aggravated by military service. The disease suffered by the petitioner was metabolic and unconnected with his service and as such he was not entitled to disability pension.

5. We have heard learned counsel for the petitioner at some length. The learned counsel for the petitioner contended that the entitlement of the petitioner to disability pension is governed by the said regulations. He drew our attention to Regulation 173 of the said Regulations which sets out the preliminary condition for the entitlement of disability pension. He contend that the disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service. He submitted that the petitioner is a wrestler and while taking part in wrestling on behalf of respondent no.2 he had suffered injury which resulted in the

disease, which has permanently invalided him. He submitted that it was wrong on the part of the respondents to hold that the petitioner' sdisease is not attributable to military service. Learned counsel pointed out that Regulation 173 has to be read with rules in Appendix II. He relied on Rules 2, 3, 4 and 7 of Appendix II. He pointed out that as per Rule 4 of Appendix II benefit of reasonable doubt has to be given to the claimant and the benefit has to be given more liberally to the claimant in service cases. He drew our attention to Rule 7 (b) and contended that as per this rule in case of a disease suffered by an individual , of which no note was made at the time of his acceptance of military service, a presumption arises that the disease had arisen while in military service. The learned counsel further stated that it is only if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to the acceptance for service that the disease will not be deemed to have arisen during service. He pointed out that there is no such medical opinion on record and hence the respondents could not have rejected

the petitioner's claim. In support of his submission learned counsel for the petitioner relied upon an unreported decision of this court in **Bhimashankar Chandram Talwar vs. The Secretary, The Union of India and ors** dated 24th February 2006 in Writ Petition no. 3860 of 1994 (Coram: **S.B. Bhase & D.G. Karnik JJ**).

6. Learned counsel for the respondents on the other hand drew our attention to the affidavit in reply filed by Major G.S. Puri and additional affidavit in reply filed by Lt. Col N.S. Mangat, Officer Commanding which state that the Medical Board consisting of expert doctors has opined that disability of the petitioner was not attributable to his military service. He was not in active military service and as such no interference is necessary with the orders passed by the respondents.

7. Before we deal with the submissions of the learned counsel it would be advantageous to refer to the relevant provisions. Regulation 173 which states the primary conditions for

disability pension reads thus:

> "173. Unless otherwise specifically provided, a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service and is assessed at 20 per cent or over.
>
> The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix II."

This regulation will have to be read along with rules in Appendix II. It is therefore necessary to reproduce Rule 2 of Appendix II, which reads thus:

> "2. Disablement or death shall be accepted as due to military service provided it is certified that: -
>
> (a) the disablement is due to a wound, injury or disease which -
>
> (i) is attributable to military service; or
>
> (ii) existed before or arose during military service and has been and remains aggravated thereby; ..."

Rule 3 reads thus:

> "3. There must be a causal connection between disablement and military service for attributability or aggravation to be conceded."

Rule 4 reads thus:

> "4. In deciding on the issue of entitlement all the evidence, both direct and circumstantial, will be taken into account and the benefit of reasonable doubt will be given to the claimant. This benefit will be given more liberally to the claimant in field service cases. "

Rule 7 (b) reads thus:

> "7(b) A disease which has led to an individual' s discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service."

8. It is clear from the aforestated provisions that a person would be entitled to disability pension if he is invalided from service on account of disability which is attributable to military service or is aggravated by military service. Rule 2 of Appendix II makes the position further clear. It states that the disease which is suffered by the claimant must be attributable to military service or must have existed before or arose during military service and there must be indication that it has been and remains aggravated by the military service. Rule 3 emphasizes the connection between disablement and military service. Rule 4 is important. It clarifies that while deciding the issue of entitlement all the evidence, both direct and circumstantial, will have to be taken into account and the benefit of reasonable doubt will have to be given to the claimant. It further says that the benefit will be given more liberally to the claimant in field service cases. Keeping these provisions in mind we are approaching the present case.

9. The petitioner's case is that he is a wrestler and he used to take part in wrestling on behalf of the respondents. According to the petitioner it is on account of the injury suffered by him while wrestling that his kidney was damaged. The petitioner was inducted in service in March 1986. He was examined at the time of his induction. Admittedly the disease was not detected at the time of his examination.

10. It is necessary to have a look at the affidavits filed on behalf of the respondents to ascertain their case. Major G.S. Puri has stated in his affidavit that the Medical Board conducted examination of the petitioner and found that the disease for which the petitioner was invalided was not attributable to military service. He has again reiterated that the medical history and clinical reports of the petitioner reveal that the petitioner's disability was neither caused due to military service nor it was aggravated due to military service. It is further stated that according to the medical Board the disease suffered

by the petitioner was metabolic and not connected with the service. It existed prior to the petitioner' s joining the military service. It is further stated that at the time of enrolment, a routine medical check up was carried out and the petitioner was found fit. At that time no critical examination was conducted. It is stated that the disease of the petitioner was detected while he was undergoing training at Army Clerks Training School and the same was not connected with the duties of his service, nor was the petitioner engaged in regular military service.

11. Lt. Col. N.S. Mangat has stated in his affidavit that on receipt of disability pension claim the office of CCDA (P) Allahabad, the Pension Sanctioning Authority takes specialist' s opinion in each case from the M A (P). He has further stated that in the instant case the Medical Board as well as M A (P), considered the disability of the petitioner as related to his military service,

hence the claim was rejected under Regulation 173. He has reiterated that the petitioner's disability is neither attributable to nor aggravated by his military service.

12. In our opinion, these affidavits do not further the respondents' case. As per Regulation 173 to which reference is made by Lt. Col. Mangat the question whether a disability is attributable to or aggravated by military service has to be determined under the rules in Appendix II. Rule 7(b) thereof contains a presumption. A disease which leads to an individual' s discharge will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual' s acceptance for military service. Therefore, if there is no note of the petitioner' s disease at the time of his acceptance for military service, then the presumption is that it has arisen in service. In this case there is no note of the petitioner' s disease at the time of his acceptance in service. Therefore, there is a presumption that it has arisen in service. This presumption could be displaced or rebutted only, if there

is on record medical opinion stating reasons that the disease could not have been detected on medical examination prior to acceptance of the petitioner in the service. Such a medical opinion is not on record. Neither Major Puri nor Lt. Col. Mangat speak about any note or any medical opinion contemplated by Rule 7(b). The presumption that the disease has arisen while in service is thus not displaced.

13. The respondents have tried to get over the absence of the note by stating that at the time of induction of the petitioner in the service no critical examination of the petitioner was conducted. Such an explanation cannot be accepted. We find it strange. The respondents are expected to conduct a critical medical examination of the entrants. The Medical examination conducted at the time of induction of a person in the army cannot be a farce. The fact that note or medical report contemplated by Rule 7(b) are not on record makes a dent in the respondent' sase.

14.It is an admitted position that while the petitioner was undergoing training at the Army Clerks Training School at Aurangabad he complained of abdominal pain. He was admitted in the hospital. The doctors found that the petitioner was suffering from Reno Vascular hypertension. Major Puri has accepted in his affidavit that the cause of this disease was non-working of right side kidney, as a result of which the petitioner was having hypertension. On 16/6/87, the petitioner underwent operation called Right Neproctomy. The medical papers of the petitioner do not indicate that hypertension was detected at the time of his examination. We cannot gloss over Rule 4 of the Appendix which states that while deciding the issue of entitlement all the evidence, both direct and circumstantial will have to be taken into account and the benefit of reasonable doubt should be given to the claimant. If there is no note of the petitioner's disease at the time of his acceptance for military service and, if there is no medical opinion that the disease could not have been detected on medical

examination prior to the petitioner' s acceptance for service then the presumption that it has arisen during military service remains unrebutted and benefit of reasonable doubt must be given to the petitioner. The petitioner' scase that the disease has nexus with Military service because his kidney was injured while wrestling for respondent 2 is probabilised. The other subsequent medical opinions stating that the disease was metabolic and not connected with the service are no substitute for the medical opinion required by Rule 7(b) that the disease could not have been detected on medical examination prior to the petitioner' sacceptance for service.

15. In this connection, we may usefully refer to the decision of this court in Bhimashankar Talwar's case (supra). In that case this court was considering the question of grant of disability pension to a military person. This court referred to the relevant rules and regulations and observed that inasmuch as no medical certificate was produced before the court to show that the disease could not have been

detected on medical examination prior to acceptance of the petitioner in service the presumption which arises under the first part of clause (b) of Rule 7 that the disease which has resulted into the discharge of the petitioner will be deemed to have arisen in service, if no note of it was made at the time of the individual' sacceptance for military service was not in any way rebutted by the respondents therein. In the circumstances this court directed the respondents to grant disability pension to the petitioner therein.

16. In the present case we are faced with a similar situation. In the circumstances of the case and for the reasons stated in the preceding paragraphs we are of the considered opinion that the petitioner must be given benefit of reasonable doubt as provided in Rule 4 of Appendix II. Facts of the present case also persuade us to give a liberal interpretation to the rules. Hence the following order:-

The impugned order dated 24.4.1991 passed by the Chief Controller of Defence Accounts (Pension),

Allahabad and order dated 2.12.1992 passed by the Secretary, Defence Ministry, New Delhi are quashed and set aside. Respondent nos. 2 and 3 are directed to grant disability pension to the petitioner in accordance with the rules.

(SHRI A. P. DESHPANDE J.) (**SMT. RANJANA DESAI** J)